April 21, 2022

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Washington, DC 20580

Submitted via Regulations.gov

Re: Request for Information on Merger Enforcement, FTC-2022-0003-0001

Public Knowledge appreciates the opportunity to comment on the Department of Justice (DOJ) and Federal Trade Commission's (FTC) merger guidelines. This is a great opportunity for our antitrust enforcement agencies to clarify this important area of the law where so much excellent research is available to improve our courts' understanding and decision-making. As experienced experts in this field, the views of the FTC and DOJ should be invaluable to courts in interpreting the law, just as past merger guidelines have been. Great progress has been made in our collective understanding of antitrust economics and the impacts of consolidation since the publication of the 2010 Horizontal Merger Guidelines, so it's important that the new guidelines make substantive changes in order to reflect new understanding.

In addition to stronger guidelines that more accurately interpret existing law, Public Knowledge believes that it's imperative for Congress to step in with statutory changes. To truly achieve competitive markets in key industries and across the economy, we need more than what existing law can accomplish. Public Knowledge supports legislation like Senator Klobuchar's *Competition and Antitrust Law Enforcement Reform Act of 2021* (CALERA) for its commonsense proposals to reform and strengthen the antitrust laws.[1] Congress can further empower antitrust enforcement through infusions of funding to ensure that agencies have the proper resources to combat the growing threat of consolidation and anticompetitive behavior throughout the economy. Sector-specific competition laws are also appropriate in key sectors such as dominant digital platforms. And other antitrust law reforms may be needed as well.

Digital Platforms

Public Knowledge believes that digital platform markets present unique risks to competition and are deserving of special analysis. Three major facets of these markets merit discussion: network effects, economies of scope and scale, and the limits of user choice. These markets tend towards tipping to one or a few powerful firms.[2] In such situations, competition occurs largely "for" the market rather than ongoing dynamic competition. Both enforcers and courts must take account of these unique features to make accurate enforcement decisions and achieve optimal market and consumer outcomes. Market participants, including the dominant platforms themselves,

[1] S. 225, 117th Cong. (2021).
[2] Nicolas Petit & Natalia Moreno Belloso, *A Simple Way to Measure Tipping in Digital Markets*, PROMARKET (Apr. 6, 2021), https://www.promarket.org/2021/04/06/measure-test-tipping-point-digital-markets/#:~:text=The%20conventional%20definition%20of%20tipping,not%20all%E2%80%94of%20the%20market.

understand these market realities and thus focus on aggressive growth to survive.[3] Digital platform markets, such as online search, e-commerce, and social networking, have grown to incredible economic importance since the last update to the merger guidelines. Public Knowledge believes this increasing importance, coupled with the unique market characteristics explained below, merits special attention in the merger guidelines.

Network Effects

A market exhibits network effects where the utility of a good goes up the more people that use said good.[4] As a network gains users, the number of potential connections goes up exponentially. This makes a larger network increasingly more attractive for both its current and potential future users. On the one hand, this is a major incumbency advantage that makes it very difficult for a second mover to have success. On the other hand, the potential for the market to tip and shift quickly to another network means that potential and nascent competitors may pose a more serious competitive threat than in other markets. Although uncertainty is high, incumbents in these markets face so little competition that enforcers and courts must err on the side of protecting the independence of these competitors. These dynamics deserve a special place in discussions about digital platform mergers. In markets characterized by network effects, companies that are small in size may still be important to protect from acquisition.[5] Agencies should look long and hard before allowing these firms to be acquired by the dominant platform purveyors (discussed in detail more below).

Economies of Scope and Scale

Today's platform markets run on data. Platforms collect data on our transactions, online searches, browser history, social media use, and so much more. This data is then aggregated and used to power targeted advertisements that make digital platforms some of the most profitable companies the world has ever seen. Data as a good has several unique properties. In many situations, data is non-rivalrous (one platform's exploitation of your data doesn't really affect the ability of another to do the same), and non-fungible (data is specific to an individual user so data from other users isn't helpful in filling in the blanks). Most importantly, however, data exhibits massive increasing returns both in scope and scale. More data, from more sources, is exponentially as valuable as less data. That means there will be a market gravitational pull keeping the companies with the most data on top.

Digital platforms also have a strong incentive to expand into as many verticals as possible, as each vertical can result in a new data stream about the user. This has a synergistic effect with network effects—bigger firms benefit both from stronger network effects and data scale

[3] *See* Tim Sullivan, *Blitzscaling*, HARVARD BUS. REV. (Apr. 2016), https://hbr.org/2016/04/blitzscaling.
[4] *See, e.g.*, Feng Zhu & Marco Iansiti, Why Some Platforms Thrive and Others Don't, HARVARD BUS. REV. (Jan. 2019), https://hbr.org/2019/01/why-some-platforms-thrive-and-others-dont.
[5] *See* Michael Kades & Fiona Scott Morton, *Interoperability as a competition remedy for digital networks*, Wash. Ctr. for Equitable Growth (Sept. 23, 2020), https://equitablegrowth.org/working-papers/interoperability-as-a-competition-remedy-for-digital-networks/.

advantages. This has advantages beyond just lowering the cost of production, but other advantages (such as attracting capital at favorable rates). This also must be taken into account as a potential motivator for and an impact of mergers. A merger that may appear not to have a horizontal impact can confer important data advantages.[6]

Natural and Unnatural Limits of User Choice

Digital platforms have unprecedented control over what their users experience on their platforms. The user interface for a website or app can be designed in ways to nudge or even aggressively push the user towards certain choices, including particular products and services.[7] Disfavored and competitor services may be more difficult for a user to access, especially when they don't know that they need to be looking extra hard to find alternatives.

This phenomenon is exacerbated by basic tenets of consumer behavior. Consumers may exhibit an "if it ain't broke, don't fix it" mentality when it comes to digital platform services. If a product has worked well enough, a user can be "sticky" and unlikely to switch and experiment with other products that may be superior.[8] Nobel Prize-winning economists Daniel Kahneman and Richard Thaler discuss how people exhibit "bounded rationality" in which they use shorthand rules of thumb to make decisions in a complex world.[9] Platforms can take advantage of this to manipulate consumer choices and stay on top. In digital platform markets dominated by online gatekeepers, just being the "best" sometimes isn't enough if consumers aren't willing to at least try your offerings.

The Importance of Protecting Potential and Nascent Competition

As a result of these market characteristics, enforcers and courts need to pay particular attention to potential and nascent competition in digital platform markets. They create markets prone to tipping, where a small, new, or potential competitor may play an outsized role. To protect competition in these markets, it's especially important to recognize the harms of acquisitions of potential or nascent competitors and block mergers that might be allowed in other types of markets.

Digital markets today are led by gatekeepers that can effectively control their competitors'

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[6] *See, e.g.*, Public Knowledge & Consumer Federation of America, *DOJ Letter on Google - Fitbit* (Apr. 29, 2020), https://publicknowledge.org/policy/public-knowledge-and-consumer-federation-of-america-doj-letter-on-google-fitbit-merger/.

[7] *See, e.g.*, The Consumer Council of Norway, *You Can Log Out, But You Can Never Leave* (Jan. 14, 2021), https://fil.forbrukerradet.no/wp-content/uploads/2021/01/2021-01-14-you-can-log-out-but-you-can-never-leave-final.pdf.

[8] Public Knowledge, *Letter to Antitrust Subcommittee for Innovation Hearing*, (July 19, 2019), https://docs.house.gov/meetings/JU/JU05/20190716/109793/HHRG-116-JU05-20190716-SD010.pdf.

[9] Richard H. Thaler, From Cashews to Nudges: The Evolution of Behavioral Economics, 108 AMER. ECON. REV. 1265 (2018)

access to the market.[10] While these markets today are characterized by a distinct lack of direct, ongoing, head-to-head competition, fear of being unseated as the market champion may have some competitive impact on dominant firms.[11] Even nascent or potential competitors can have positive effects for consumers in the market and influence the dominant players to innovate and respond. This competition might not look like much, but any sort of competitive pressure is vastly preferable to none at all.

This leads to a discussion of what is known as Type I and Type II errors. Since predicting the future is difficult, it's likely that "errors" may sometimes occur in antitrust enforcement. Type I errors are where the agencies block a benign merger ("false positive") while Type II errors represent the inverse, the agencies failing to block an anticompetitive merger ("false negative"). The concept was originally introduced by Frank Easterbrook in a seminal article in which he argued antitrust should be far more concerned with Type I, which might be termed "over-enforcement" than Type II, "under-enforcement" errors.[12]

The result of Easterbrook and his intellectual progeny has been systematic underenforcement of our antitrust laws and rising concentration throughout the entire economy. Today's experts have convincingly argued that antitrust has become unbalanced with deleterious effects on the economy as a whole.[13] However, the Easterbrook Type I error bias deserves special condemnation in markets prone to tipping such as digital markets.

Easterbrook dramatically overestimates market contestability and focuses too much on unquantified potential benefits, especially in the digital market context. The maxim that a firm cannot enjoy monopoly profits for long before competitors will swoop in for their own slice of the pie doesn't hold true in markets with massive entry barriers like digital platform markets. Meanwhile, increasing consolidation stifles innovation (especially the market-changing type that could threaten the dominant status quo) making the potential benefits even more illusory in platform markets.[14]

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[10] *See* Jonathan B. Baker, Joseph Farrell, Andrew I. Gavil, Martin S. Gaynor, Michael Kades, Michael L. Katz, Gene Kimmelman, A. Douglas Melamed, Nancy L. Rose, Steven C. Salop, Fiona M. Scott Morton & Carl Shapiro, *Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets*, WASH CTR. FOR EQUITABLE GROWTH (2020), https://equitablegrowth.org/wp-content/uploads/2020/04/Joint-Response-to-the-House-Judiciary-Committee-on-the-State-of-Antitrust-Law-and-Implications-for-Protecting-Competition-in-Digital-Markets.pdf.
[11] George J. Stigler Ctr. for the Study of the Econ. and the State, Comm. for the Study of Dig. Platforms Mkt. Structure and Antitrust Subcomm. Report ["Stigler Report"] 50 (Jul. 1, 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C.
[12] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984).
[13] *See e.g.*, Steven C. Salop, *Dominant Digital Platforms: Is Antitrust Up to The Task?*, 130 YALE L.J.F. 563 (2021); Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. OF EUROPEAN COMP. L & PRACTICE 131 (2018); and TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).
[14] *See, e.g.*, Asher Schechter, *Mergers Are Bad for Innovation*, PROMARKET (Sept. 29, 2017), https://www.promarket.org/2017/09/29/mergers-bad-innovation/.

Fundamentally, competition in these markets is *hard*. The theory that an agency mistakenly approving an ultimately anticompetitive merger would lead to new entry that would quickly alleviate any competitive concerns has not proven true in platform markets. For example, Facebook's acquisitions of Instagram and WhatsApp simply extended its dominance of social networking and no direct competitors have yet meaningfully entered. Given the high costs of Type I errors in these markets, it makes far more sense to worry more about Type II errors.

As an example, when Facebook sought to purchase Instagram, it faced a rare inflection point in its growth where it may have been at risk of being unseated.[15] A new technology, mobile phones, was taking off, and Facebook was slow to adapt. They might or might not have weathered that transition as the largest network. Facebook recognized the importance of retaining their position as the dominant incumbent, a "bet the firm" imperative in a market prone to tipping like social networking. Instagram was thriving with its focus on mobile, and despite its small size it had a dedicated and growing user base. Of course, the FTC's internal deliberations on that merger are non-public. But neither the agency nor the courts seemed to recognize at the time the general principle that a small competitor in what might at the time have been considered an adjacent industry could have a significant competitive impact on an incumbent in a market prone to tipping. It's crucially important that they incorporate this economic learning to be able to block a similar merger in the future.

Making Merger Enforcement More Efficient

The Federal Trade Commission and the Department of Justice are overworked and understaffed. The FTC has fewer staff than it did during the Jimmy Carter administration.[16] Meanwhile, mergers are at an all-time high. What was once a yearly estimate for the number of mergers that the agencies would need to evaluate (~200) is now happening about every two weeks.[17]

Strict statutory merger review timelines remain static despite the smaller staff and higher caseload. The current system is not working well for anyone. Agency staff is swamped with a backlog of requests and are thus unable to give every deal the scrutiny it deserves. This could lead to a situation where a deal that harms consumers and should be blocked might be able to sneak through. Honest businesses are also negatively affected by the inefficiencies of the current system. They face uncertainty for deals that should be quickly approved and have to face the specter of litigation to unwind their mergers for years. More funding and extending the statutory timelines for review would both be important statutory changes. Merger guidelines also have an important role to play in creating a more efficient system. Efficient merger enforcement would give businesses the clarity they need to properly pursue their economic goals.

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[15] Amended Complaint, FTC v. Facebook, Inc., No. 1:20-cv-03590-JEB (D.D.C. Aug. 19, 2021).
[16] Federal Trade Commission, *FTC Appropriation and Full-Time Equivalent (FTE) History*, https://www.ftc.gov/about-ftc/bureaus-offices/office-executive-director/financial-management-office/ftc-appropriation (showing 1,746 employees in 1979 compared to just 1,123 in 2021).
[17] Federal Trade Commission, *Premerger Notification Program*, https://www.ftc.gov/enforcement/premerger-notification-program (showing ~400 HSR filings per month).

More Clarity Through Clear Presumptions

Properly constructed, the merger guidelines should provide clarity to both enforcers and businesses. Antitrust enforcement agencies are incredibly resource-constrained and need to operate efficiently. The merger guidelines should be structured in such a way that obviously anticompetitive mergers never make it out of the boardroom.[18] Presumptions can provide needed clarity and predictability. If incorporated into the guidelines, they can put the evidentiary burden on the merging parties rather than overworked and underfunded enforcers. This saves businesses from wasting time and effort on long-shot legal challenges, and enforcers can focus their efforts on mergers that are a closer call.

Presumptions make sense for several reasons. First, it is the merging parties themselves who have the most relevant information in their possession and are thus best equipped to prove their merger would be competitively benign.

Second, presumptions can halt competitively dangerous mergers in their infancy, saving agencies precious time and resources. When companies know that they'll have to offer proof alongside their merger applications, they should be far more wary of meritless mergers. This in turn allows the agencies to focus on the edge cases, creating further clarity in merger law which benefits all players.

Third, basic tenets of justice and fairness lean towards putting initial evidentiary burdens on the merging parties themselves in a wider range of circumstances. Antitrust enforcement agencies work for the public, not the merging parties. The pre-merger notification process confers a benefit on would-be merging parties seeking an advance indication from the agencies if their proposed deal would result in litigation.

One possible presumption that we think is appropriate would be a "dominant platform" presumption. This would state a dominant platform's attempts to acquire either: 1) a firm with a substantial probability of entering into competition with it absent the merger, or 2) a firm competing in an adjacent market would be presumptively anticompetitive. A dominant platform would be defined as one with gatekeeper or "bottleneck" power.[19] This could function as a proper way to recognize and account for the power that dominant platforms can exert in an already competitively precarious market. For more on this presumption as well as other potential presumptions, please see the joint comments of Public Knowledge and the Open Technology Institute on the Vertical Merger Guidelines.[20]

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[18] *Oversight of the Enf't of the Antitrust Laws Before the Subcomm. on Antitrust, Competition Pol'y and Consumer Rights of the S. Comm of the Judiciary* 114th Cong. (2016) (statement of Bill Baer, Asst. Att'y Gen., Antitrust Division), https://www.justice.gov/opa/speech/assistant-attorney-general-bill-baer-antitrust-division-testifies-senate-judiciary.

[19] Stigler Report, *supra* note 11, at 32; Digital Competition Expert Panel, *Unlocking digital competition* 59 (Mar. 13, 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking _digital_competition_furman_review_web.pdf.

Clear presumptions can also cut down on the resources devoted to expensive competing economic analyses. Those same competing economic experts also spend time quantifying proposed efficiencies that may never materialize. Limiting these burdensome and sometimes unnecessary costs can allow the agencies to take on more mergers, as well as needed conduct enforcement.

Giving Less Credence to Merger Efficiency Claims

A recurring problem in merger enforcement is that merging companies are able to claim broad, consumer-centric efficiencies that will come about as a result of their merger. These claims receive little pushback from the agencies when they are made, despite sometimes questionable evidence in their favor. This problem is compounded by little to no follow-up from the agencies asking if the promised efficiencies ever materialized. If merging parties want to claim that their merger will be good for consumers, not just their shareholders, they should be forced to actually follow through on their claims.[21]

Absent competition, there is no reason to expect businesses to pass on earned efficiencies to consumers. Businesses are profit-maximizing enterprises and if consumers have nowhere else to go, businesses can comfortably raise and maintain prices at monopoly levels, no matter how "efficient" their operation becomes. Therefore, even if the agency analyzes efficiencies, they should be discounted or dismissed if insufficient competition exists post-merger. Consumers lose if they are made to give up competition in exchange for efficiencies. Heavy skepticism is also warranted for claims that concentration in an existing market will allow entry into a new one.

An excellent example of this phenomena is the AT&T/Time Warner merger. AT&T was able to complete the transaction in large part due to big claims about consumer-centric, merger-specific efficiencies. We now know those claims never materialized.[22] There was no continuing oversight of the AT&T/Time Warner combination and thus no real need for the company to follow through on its lofty promises. So, they didn't.

True efficiencies can result from a merger and in some cases consumers might be better off. Companies are free to claim this, but the merger guidelines should specify some level of proof needed. Just as wild claims devoid of factual basis are thrown out early in the litigation process, so should claims of merger efficiencies without a factual proof background.

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[20] Public Knowledge & Open Technology Institute, *Comments on the Draft Vertical Merger Guidelines* (Feb. 26, 2020), https://publicknowledge.org/policy/comments-to-doj-and-ftc-on-vertical-merger-guidelines/.

[21] *See* American Antitrust Institute & Public Knowledge, *DOJ Letter on Discovery/WarnerMedia Merger* (Sept. 2, 2021), https://publicknowledge.org/policy/public-knowledge-and-american-antitrust-institute-doj-letter-on-discovery-warnermedia-merger/.

[22] *See* John Bergmayer, *AT&T is Reminding Us Why the Video Marketplace Was Traditionally Highly Regulated*, PUBLIC KNOWLEDGE (June 3, 2020), https://publicknowledge.org/att-is-reminding-us-why-the-video-marketplace-was-traditionally-highly-regulated/.

Enforcement agencies should also have some sort of enforcement mechanism to ensure claimed efficiencies actually come to pass. This could be through unwinding mergers or by putting efficiency claims into consent decrees so the agency can enforce them. Notably, previous iterations of the guidelines expressed deep skepticism of merger efficiency claims, and we would advocate a return to this kind of thinking.[23]

Platform Annexation Deserves Special Scrutiny

Public Knowledge would like to highlight academic work by Susan Athey and Professor Fiona Scott Morton on "platform annexation."[24] This is a phenomenon where a dominant platform acquires a company in an adjacent market that makes multi-homing more difficult for the user. Although not strictly vertical or horizontal, platform annexation deals give rise to a conflict of interest whereby a dominant provider has the incentive to degrade or withdraw the multi-homing experience for its competitors. If market participants are forced to choose just a single provider, it will most likely be the dominant player.

Multi-homing can be the competitive Achilles heel for dominant platforms. Their gatekeeper power makes it incredibly difficult for individuals and business users to quickly and completely leave. A seller might stick with Amazon even when they face mistreatment if the alternative is to completely sever their relationship with Amazon and thus lose their main conduit to customers and profits. In a "take it or leave it" world, dominant platforms win at the expense of those relying on the gatekeeper. Multi-homing allows companies to wean themselves off the dominant platform gradually. The company can experiment with other platforms, while maintaining a relationship with the dominant platform, and then completely migrate over time.

A market with a high-degree of multi-homing is much more likely to be a competitively vibrant one. Multi-homing creates competitive pressure on dominant platforms. If they mistreat their platform business users through high fees or onerous terms, those business users have options to gradually disassociate themselves from the dominant platform. We should thus encourage making multihoming as seamless as possible and the merger guidelines should be especially wary of potential mergers to make multi-homing more difficult.

An example of this phenomenon can be found in the recent Amazon purchase of start-up Veeqo.[25] At first blush, there might appear to be little competitive concern in the acquisition. Veeqo is a small start-up with around 60 employees that didn't even directly compete with Amazon. Veeqo's core product was a tool that allowed online sellers to manage their sales and inventory across multiple e-commerce platforms, from Amazon to eBay to Shopify. In other words, Veeqo was a tool that made multihoming in e-commerce easier. Now that it is under

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[23] U.S. Dep't of Justice, Merger Guidelines ¶ 10 (1968), https://www.justice.gov/archives/atr/1968-merger-guidelines.

[24] Fiona M. Scott Morton & Susan Athey, *Platform Annexation*, SSRN (Feb. 16, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3786434.

[25] Annie Palmer, *Amazon acquires Veeqo, a start-up that helps sellers manage their online businesses*, CNBC (Mar. 7, 2022), https://www.cnbc.com/2022/03/07/amazon-acquires-e-commerce-software-start-up-veeqo.html.

Amazon's control, there are clear incentives to degrade interoperability with other platforms which in turn will force sellers to pick the one dominant player in the space—Amazon.

American Express and Two-Sided Markets

In *Ohio v. American Express Co.* (*AmEx*), the Supreme Court in effect created special rules for two-sided markets.[26] Special rules for two-sided markets don't make sense: separating a two-sided market from other types of markets is inexact, and harms to one "side" of the market should not be justified by benefits to another "side" of the market. While a statutory fix would be most effective at addressing this bad decision, it is appropriate and necessary for enforcers and courts to take a narrow interpretation of the *AmEx* case.

Of particular relevance for merger enforcement would be the proposition that companies competing on only one side of a market are not in the same market as companies competing on both sides of the market.[27] If not explicitly rejected by the guidelines, it could lead to a disastrous loophole allowing dominant digital platforms free reign to acquire and kill their one-sided competitors. Digital platform markets are notoriously two-sided. The Amazon Marketplace connects buyers and sellers and Google Search connects advertisers on one side with users and their search results on the other. These companies are so large and powerful, it can be too much to ask for a competitor to simultaneously enter every vertical a digital platform has a presence in. A strong competitor active on only one side of the market can exert meaningful competitive pressure on the dominant platform provider and thus an acquisition of such a company by the two-sided incumbent may cause harm to competition.[28]

Conclusion

With bold leadership in place, Public Knowledge is pleased to see the FTC and DOJ move forward on a rethinking and a revitalization of the merger guidelines. We hope these ideas will aid the enforcement agencies during their process. We welcome the opportunity to expound further on these ideas.

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[26] 138 S. Ct. 2274 (2018).

[27] Charlotte Slaiman, *U.S. v. Sabre Decision Is Wrong About Platform Markets*, PUBLIC KNOWLEDGE (Apr. 9, 2020), https://publicknowledge.org/u-s-v-sabre-decision-is-wrong-about-platform-markets/.

[28] *See* Aaron M. Panner, *Market Definition and Anticompetitive Effects in* Ohio v. American Express, 130 YALE L.J.F. 608 (2020).